

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

TOWARD RESPONSIBLE DEVELOPMENT
ET AL,

Petitioner,

v.

CITY OF BLACK DIAMOND,

Respondents,

And

BD LAWSON PARTNERS, LP and BD
VILLAGE PARTNERS, LP,

Intervenors.

Case No. 10-3-0014

**ORDER ON MOTION TO AMEND
PREHEARING ORDER**

This matter comes before the Board on a Motion to Amend Prehearing Order filed January 3, 2011 by Toward Responsible Development, et.al (TRD). With this motion, TRD seeks to add an additional issue to those provided for in the December 29, 2010 Prehearing Order. The City of Black Diamond and Intervenors BD Lawson Partners, et al filed objections to TRD's motion.¹

I. BOARD DISCUSSION AND ANALYSIS

RCW 36.70A.290 requires a Petition for Review (PFR) setting forth a detailed statement of the issues to be filed within 60 days of publication of the challenged action. TRD complied with this requirement by filing its PFR on November 19, 2010 and its 1st Amended PFR on

¹¹ Intervenor's Response to TRD's Motion to Amend Pre-Hearing Order, filed January 4, 2011; Black Diamond's Response to TRD's Motion to Amend Prehearing Order, filed January 4, 2011.

1 November 24, 2010, both within the statutory time period and with the required issue
2 statements.² At the December 20, 2010 Prehearing Conference, the Presiding Officer
3 requested clarification of the issue statements by the Petitioners. Petitioners provided such
4 clarification on December 28, 2010 by filing a 2nd Amended PFR.³ The Board issued the
5 Prehearing Order enumerating the issues to be reviewed in this matter on December 29,
6 2010.
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8 With its Motion to Amend, TRD now seeks to add an issue to those set forth in the
9 December 29 Prehearing Order. The issue, which TRD contends is closely related to its
10 previously stated jurisdictional and public participation issues and its addition should not
11 impact the ability of the parties to substantively respond, is as follows:⁴
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13 Whether the City violated the requirements of RCW 36.70A.106 by failing to
14 notify the Department of Commerce (formerly the Department of Community
15 Development) of the city's intent to adopt the development regulations
16 contained in the ordinances at least 60 days prior to final adoption and
17 whether the city failed to transmit a complete and accurate copy of the
18 development regulation to the department within ten days after final adoption?

19 TRD files the present motion pursuant to WAC 242-02-260 which states: (Emphasis added,
20 in relevant part)

- 21 1) A petition for review or answer may be amended as a matter of right until thirty
22 days after its date of filing.
- 23 2) *Thereafter any amendments shall be requested in writing by motion, and will be*
24 *made only after approval by a board or presiding officer. Amendments shall not be*
25 *freely granted and may be denied upon a showing by the adverse party of*
26 *unreasonable hardship, or by a board's finding that granting the same would*
27 *adversely impact a board's ability to meet the time requirements of RCW*
28 *36.70A.300 for issuing a final order...*
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30 ² Petitioners' original PFR set forth 12 issues. With its 1st Amended PFR, Petitioners' expanded their issues to
31 a total of 15.

32 ³ The 2nd Amended PFR set forth the same 15 issues provided for in the 1st Amended PFR but provided the
request clarification as to the which provisions of the GMA and/or comprehensive plan policies/goals were
allegedly violated.

⁴ Motion to Amend, at 2

1 Both the City and the Intervenor object to the addition of this new issue, contending not
2 only that it was omitted from all of TRD's prior filings but that it is simply "too late" as it is
3 beyond the GMA's 60-day appeal period.⁵
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5 The Board agrees with the City and Intervenor. While several Board cases are referenced in
6 the parties' briefings,⁶ the Board finds its holding in *Giba v. City of Burien*, Case 06-3-0008,
7 closely tracts similar circumstances found in this case. In *Giba*, like in the present matter,
8 the petitioner based her motion to add an issue statement on WAC 242-02-260. However,
9 the Board denied the motion noting:⁷
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11 [It] adds issues not include in the original PFR, discussed at the PHC, or
12 contained in the PHO.

13 Similarly, TRD filed an original PFR, an amended PFR, discussed their issues at the
14 Prehearing Conference, and subsequently filed another amended PFR. At no time did the
15 question of compliance with RCW 36.70A.106 arise. Although WAC 242-02-260 allows for
16 amendments, RCW 36.70A.290's requirement for a petitioner to articulate their issues within
17 60 days prohibits the addition of issues beyond that statutory appeal period. Refinement
18 and/or clarification of the issues can occur after the appeal period has elapsed, however, for
19 the Board to allow new, previously unarticulated issues to be presented would simply
20 amount to a PFR becoming an issue "placeholder" contrary to .290's requirement for a
21 "detailed statement of the issues."
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24 II. ORDER

25 Based upon review of the filings in this matter, the Growth Management Act, RCW 36.70,
26 Board Rules of Practice and Procedure, WAC 242-02, and prior Board decisions, the Board
27 enters the following order:
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30 ⁵ City's Response, at 1-2; Intervenor's Response, at 1-3.

31 ⁶ Intervenor's Response, at 2 (citing to *Samson v. City of Bainbridge Island*, Case 04-3-0013, Order on
32 Motions, at 5 (July 6, 2004)(Board will not allow new issues not stated in PFR to be introduced in a
restatement of the issues); *Hood Canal Environmental Council v. Kitsap County*, Case 06-3-0012, FDO at 25
(Aug. 28, 2006)(New issues may not be introduced during the briefing/argument for the hearing on the merits))

⁷ Order on Motions, at 3 (April 17, 2006)

1 TRD's Motion to Amend Prehearing Order is **denied**.

2 Entered this 18th day of January, 2011.

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5 Dave Earling, Presiding Officer
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